87-69

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SACILOR, ACIERIES ET LAMINOIRS DE LORRAINE, BERGROHR-HERNE, AND VALLOUREC,
Petitioners,

v.

UNITED STATES OF AMERICA, MALCOLM BALDRIGE, SECRETARY OF COMMERCE, UNITED STATES DEPARTMENT OF COMMERCE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party having standing at the outset of litigation can lose that standing as a result of subsequent events?

2. Whether foreign steel producers who have contracted to supply steel pipe to a United States purchaser have standing under Article III of the Constitution, and the Administrative Procedures Act or the Fifth Amendment Takings Clause to challenge the Secretary of Commerce's refusal to permit imports of the pipe that is the subject of the contracts?

3. Whether the foreign steel producers' challenge to the Secretary of Commerce's decision is moot, even though resolution of that challenge is a prerequisite to disposition of the producers' claim for damages against the United States for a taking of their property without payment of just compensation?

LIST OF PARTIES

The petitioners herein are Sacilor, Acieries et Laminoirs de Lorraine ("Sacilor"), Bergrohr-Herne, and Vallourec, the plaintiffs in the original cases *Sacilor, Acieries et Laminoirs de Lorraine and Bergrohr-Herne v. United States of America, Malcolm Baldrige, Secretary of Commerce, and The United States Department of Commerce*, No. 85-05-00664 (Ct. Int'l Trade filed May 13, 1985) and *Vallourec v. United States of America, Malcolm Baldrige, Secretary of Commerce and The United States Department of Commerce*, No. 85-05-00669 (Ct. Int'l Trade filed May 15, 1985). The United States of America, Malcolm Baldrige, Secretary of Commerce, and the United States Department of Commerce are the respondents before this Court and were the defendants in the original actions.

Petitioners list the following United States parent companies, subsidiaries, or affiliates pursuant to Rule 28.1: Berg Pipe Inc.; Berg Steel Pipe Inc.; Hood & Co.; Creusot Marrel Inc.; CSF Corp.; Usinor Industries Inc.; Usinor Steel Corp.; Barsteel Corp.; Vicksburg Steel Service Inc.; Metron Steel Corp.; Metron Warehouse Inc.; American European Steel Services Inc.; American International Metal Service Inc.; and CL Metal Inc.

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v.

UNITED STATES OF AMERICA,
MALCOLM BALDRIGE, SECRETARY OF COMMERCE,
UNITED STATES DEPARTMENT OF COMMERCE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners respectfully pray that a writ of *certiorari* issue to review the March 31, 1987 judgment of the United States Court of Appeals for the Federal Circuit in this action.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit dated March 31, 1987 and issued as a mandate on April 22, 1987 is reprinted in Appendix A hereto at 1a, *infra*. The opinion of that court is reported at 815 F.2d 1488, and is reprinted in Appendix B hereto at 2a-9a, *infra*.

The opinion and order of the United States Court of International Trade (Restani, J.) is reported at 613 F. Supp. 364, and is reprinted in Appendix C hereto at 10a-23a, *infra*.

JURISDICTION

Petitioners seek review of the judgment and opinion of the United States Court of Appeals for the Federal Circuit dated March 31, 1987. The Chief Justice has granted petitioners an extension to and including July 13, 1987, to file this petition and it is being filed within the appropriate deadline.

The jurisdiction of this Court to review the opinion of the Federal Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The ruling below raises issues under Article III, Section 2 of the Constitution, which limits the judicial power of the federal courts to "cases" or "controversies" and under the Fifth Amendment of the Constitution which prohibits the taking of private property for public use without the payment of just compensation.

STATUTES INVOLVED

The ruling below involves the Steel Import Stabilization Act, Title VIII of the Trade and Tariff Act of 1984 (Pub. L. No. 98-573, Oct. 30, 1984), 19 U.S.C. § 2253 note ("SISA"), and particularly Section 805(b)(3) thereof which provides that:

> Nothing in this subsection may be construed as prohibiting the Secretary of Commerce from permitting the importation of additional quantities of specific products in cases where the Secretary determines that conditions of short supply or emergency economic situations related to market demand exist, except that a short supply or emergency economic situation shall not be considered to exist solely because domestic producers are unwilling to supply products at prices below their costs of production (as determined by the Secretary of Commerce).

The ruling below also involves the judicial review provisions of the Administrative Procedures Act, 5 U.S.C.

§§ 701 *et seq.* ("APA"), and particularly § 702 thereof which provides in pertinent part, as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT OF THE CASE

1. *Summary Statement*

Petitioners, European steel producers,[1] had contracted to supply certain highly specialized steel products to an American purchaser. Pursuant to a later-enacted statute, the United States entered into an agreement with the European Communities ("E.C.") limiting U.S. imports of steel products, but allowing products found to be in short supply by the Secretary of Commerce to be imported outside of the agreement's limits. Petitioners were denied standing to challenge the Secretary's refusal of their short supply request. The court below further declared petitioners' claims moot even though the adjudication of such claims was a prerequisite to the disposition of their claim for damages against the United States for a taking of their property without payment of just compensation.

2. *The Relevant Facts*

Petitioners are producers of various steel products, including line pipe. On September 25 and October 1, 1984, they contracted to supply 274,000 tons of grade X-70, 30″ inch diameter .281″ wall thickness line pipe for use by the U.S.-based All American Pipeline Company ("AAPL") in its construction of a pipeline designed to transport crude oil from California to Texas. In order to prevent leaks and spills in the pipeline from the highly corrosive

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[1] Sacilor and Vallourec are French corporations. Bergrohr-Herne is a West German corporation.

oil to be transported, AAPL required, and petitioners agreed, that this pipe would meet rigorous specifications for mechanical and physical properties and stringent testing requirements. Despite numerous requests from AAPL, no domestic producers of steel pipe submitted bids to supply AAPL the particular pipe it sought.

3. *The SISA*

One month after these contracts were signed, the Congress enacted the SISA, 19 U.S.C. § 2253 note. It authorizes the President, for a five year period, to enforce the quantitative limitation and other terms of bilateral arrangements that may be entered between the United States and steel exporting nations (Section 805(a)). Imports in excess of agreement levels, however, are permitted by the SISA where the Secretary of Commerce determines that conditions of short supply or emergency economic situations related to market demand exist (Section 805(b)(3)).

4. *The Arrangement*

On January 10, 1985, 2½ months after enactment of the SISA, the United States entered an Arrangement with the E.C. Concerning Exports of Pipes and Tubes to the United States ("Arrangement"), one of 20 voluntary restraint agreements ("VRAs") concluded by the United States with steel producing countries limiting steel exports to the United States. The Arrangement limits, through binding export licensing procedures, E.C. exports of steel pipes to the United States.

Article 8 specifies that pipe exports in excess of the Arrangement's quantitative limitations shall be permitted where a shortage of supply based on "objective evidence" is identified. It provides:

> The U.S. *shall* accept exports of pipes and tubes in addition to those permitted under section 1 and 2 where a shortage of supply is identified, i.e., *where*

> *the U.S. industry is unable to meet demand in the USA for a particular product.* At the request of the EEC, on the basis of information received from U.S. consumers, consultations shall take place between the EEC and the U.S. authorities. If necessary, the advice of an independent expert may be sought by either party. The U.S. shall make a decision under this section on the basis of *objective evidence* from all relevant sources within a maximum of sixty days from the date of the request for consultations.
>
> The U.S.A. recognizes that priority should be given to the examination, under the 'short-supply' provisions of this Agreement, of requests concerning contracts recognized to have been already concluded between USA and EEC enterprises and which are in course of execution in connection with large projects.

(Emphasis added).

5. *Administrative Proceedings Under The SISA*

All the VRAs contain short-supply clauses substantially similar to the one in the Arrangement.[2] Since 1985, approximately 90 requests for short supply determinations under the SISA and the VRAs have been submitted to the Commerce Department by U.S. purchasers, foreign steel producers and foreign governments.[3] These requests have sought approval by the Secretary of Commerce for imports totalling over 1.1 million tons in excess of the quantitative restrictions established under the various VRAs. In fact, only 37 requests for some 57,000 tons have been granted.

6. *The Short Supply Request In Question*

Pursuant to the SISA, § 805(b)(3), 19 U.S.C. § 2253 note, and Art. 8 of the Arrangement, on January 21,

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[2] H.R. Rep't No. 99-937, 99th Cong., 2d Sess. (1986) at 12.

[3] Short-supply request files are available to the public in the public reading room of the U.S. Department of Commerce's International Trade Administration.

1985, the E.C., on behalf of petitioners, submitted a request to the Commerce Department seeking a determination that the particular pipe to be supplied to AAPL by petitioners was in short supply. AAPL joined this request. In that joinder, AAPL described the pipeline it was constructing and explained why exacting pipe specifications were needed for its construction. AAPL reviewed the domestic supplier bids it had received and explained why none of the products offered in the bids met its specification and testing requirements. AAPL concluded that no U.S. supplier was capable of supplying the particular product needed for a safe pipeline.

In its review of the request, the Commerce Department sought public comments and information on the relevant economic factors. 50 Fed. Reg. 4719-20 (1985). It also sent questionnaires to domestic producers asking (i) if they could supply the particular product sought by AAPL, or, if not, another product which, *in such supplier's opinion*, would satisfy AAPL's needs, and (ii) if AAPL's technical requirements were justified. These questions were completely improper in that they represented an attempt to substitute the judgment of either the Commerce Department or U.S. producers for that of the buyer, as to the type of pipe which would fulfill its requirements. Neither the SISA nor the Arrangement authorizes such inquiries, or denials of short supply requests based on such information. On March 28, 1985, in a final agency action, the Commerce Department denied the request, saying only that "the U.S. industry is able to meet demand in the United States for this product." That denial prevented petitioners from delivering some $75 million worth of pipe.

7. *The Decision of the Court of International Trade*

On May 13 and 15, 1985, petitioners brought suit under the APA in the United States Court of International Trade alleging that (i) the denial was arbitrary, capri-

cious, an abuse of discretion or otherwise not in accordance with law, 5 U.S.C. § 706, and (ii) by failing to convene a hearing, the Secretary of Commerce's denial deprived petitioners of their rights to due process of law. Under 28 U.S.C. § 1581(i), the Court of International Trade has *exclusive* jurisdiction over such actions.

Following briefing and oral argument on defendants' request for the court's consideration of certain threshold questions including jurisdiction, standing, justiciability, and judicial review, the Court of International Trade issued its opinion and order on June 21, 1985, in which it determined that petitioners properly invoked jurisdiction under 28 U.S.C. § 1581(i). (14a-15a). It also found that petitioners had suffered "injury in fact" and were "adversely affected or aggrieved" within the meaning of the APA by the denial of the short supply request, as a result of which petitioners were unable to deliver the quantities of steel pipe called for in their preexisting contracts. (17a). In addition, petitioners, as foreign steel manufacturers, were found to be arguably within the zone of interests regulated by the SISA, and thus had standing to pursue the actions. (18a-19a). Furthermore, the court determined that the case remained a live controversy since petitioners were prevented from delivering the quantities called for under their contracts. (14a).

However, the court dismissed petitioners' suits, holding that neither the SISA nor the Arrangement established direct, affirmative and judicially enforceable rights for private parties in the position of petitioners. (15a-16a). The court also found that the short supply decision was one committed to agency discretion by law, 5 U.S.C. § 701(a)(2), in that it was part of the foreign affairs process and was therefore unreviewable by the courts. (19a-21a). Finally, the court held that petitioners' due process claim must fail since their "claim of entitlement" to ship the steel pipe to the United States which had been taken away by the Commerce Department was not "legitimate". (21a-22a).

8. *The Decision of the Federal Circuit*

Nearly two years after the Court of International Trade rendered its decision, and more than one year after oral argument, the Federal Circuit vacated and remanded the Court of International Trade's decision, holding that petitioners lacked standing to raise their claims and that their claims had become moot.

On standing, the Court of Appeals held that petitioners failed to satisfy the constitutional aspects of the standing doctrine. (6a-7a). The court recognized that petitioners suffered injury in fact as a result of the denial of the short supply request, but concluded that relief would not be likely to follow from a favorable judicial decision. (7a).

The Federal Circuit also concluded that petitioners did not satisfy the prudential aspect of the standing doctrine even though they were arguably regulated by the SISA. (7a-8a). This was due, the court decided, to the fact that Congress did not intend to rely on foreign manufacturers to challenge administrative application of American import laws. (7a). Rather, the legislative history indicated that the SISA's short supply provision was enacted to protect domestic purchasers of steel products. (7a-8a).

On mootness, the court stated that petitioners and AAPL were released from their contractual obligations by their contracts' *force majeure* clauses, and that in the nearly two years since the filing of the suits, AAPL obtained elsewhere the pipe it needed to complete the pipeline.[4] (8a). Because the court assumed that the goal of the suit was to allow petitioners to export pipe to the United States to fulfill their obligations to AAPL, it held there was no live case or controversy to be resolved by the litigation. (8a).

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[4] The alternate pipe obtained by AAPL from U.S. sources did not meet its original specifications.

Without citation to any authority, the court went on to dismiss petitioners' arguments to the effect that the possibility of recovery of money damages in the Claims Court on a Fifth Amendment taking theory means that the action remains a live controversy. (8a). The court was of the view that no such claims were presented to the trial court, and it would not render an advisory opinion on claims that were not or could not be raised below. (8a).

Finally, the Federal Circuit cast considerable doubt on the lower court's reasons for dismissing the suits by stating that, while it was unnecessary to address the issue of whether the short supply determination was committed to agency discretion by law, due to its decision on the standing and mootness issues, the analysis of a similar question by this Court in *Japan Whaling Ass'n v. American Cetacian Soc.*, 478 U.S. ——, 106 S. Ct. 2860, 2865-66 (1986), would apply. (9a).

REASONS FOR GRANTING THE WRIT

The decision of the Federal Circuit raises important questions concerning both the standing and mootness doctrines which it decided in a manner directly in conflict with this Court's and the District of Columbia Circuit's prior holdings. These questions should be settled by this Court without delay in view of this case's broad implications for this country's steel trade with foreign nations.

I. Failure By This Court To Review This Case Would Have Broad Implications For The Future Of U.S. Steel Trade With Foreign Nations

The issues raised by the instant case must be examined against the backdrop of this country's steel trade with foreign nations, and more particularly, of the regulation of such trade. At present, pursuant to the SISA, 20 separate VRAs have been entered with steel exporting nations covering in 1986 some 74% of total steel imports

valued at about $8.5 billion.[5] Petitioners are responsible for approximately 5% of all United States steel imports and 18% of steel imports from the E.C. All the VRAs contain short supply provisions substantially similar to that in the Arrangement. While the VRAs are all scheduled to expire in September 1989, U.S. steel producers have already indicated that they will press for their extension beyond that date.[6] Given a history of some 20 years of protection granted by the government to the U.S. steel industry,[7] there is a strong likelihood that the current VRAs, including this short supply provision, will be extended beyond September 1989.

The fair application of the short supply provisions by the Commerce Secretary is essential to the smooth working of the VRA program. Indeed, if, as in this case, foreign exporters are denied standing to challenge short supply determinations made contrary to the SISA and the various international agreements, then such foreign exporters and their governments are denied one of the fundamental benefits of these agreements, *i.e.*, the ability to supply outside of the quota limits those products which are in short supply in the United States. In that event, countries whose nationals are subject to arbitrary unreviewable short supply decisions are very likely to be offended. This, in turn, could well lead such countries to

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[5] *Monthly Report on Selected Steel Industry Data*, U.S. Int'l Trade Comm'n Pub. No. 1974 (1987), Table 7 at 8. Steel imports from the European Community totalled over $2.3 billion.

[6] 4 BNA Int'l. Trade Rept. 704 (1987).

[7] The first steel VRA's were concluded in 1969 (*See* Lowenfeld, *Public Controls On International Trade*, 2d ed. (1983) at 202-06). Those were followed by further VRAs or other market limitation agreements in 1972 (*id.* at DS 571-77), 1976 (Agreement Between the United States and Japan Concerning Specialty Steel Imports, 27 U.S.T. 4145, T.I.A.S. 8442, signed at Washington, D.C. June 11, 1976), 1982 (U.S.-E.C. Arrangement, 47 Fed. Reg. 49060 (1982)), and 1983 (Presidential Proclamation 5074 of July 19, 1983, 48 Fed. Reg. 33233 (1983)).

resort to retaliation, *i.e.*, limits or outright bans on their imports of U.S. products, as the only means of being heard, thereby worsening this country's already severe trade deficit. In light of these potentially severe international consequences,[8] the country and its trading partners must be assured that this issue will now receive the consideration of this nation's highest Court.

II. The Federal Circuit's Decision On Mootness Conflicts With That Of The District Of Columbia Circuit In A Substantially Similar Case, And Ignores This Court's Prior Decisions

When the issue of the possible mootness of the instant case due to the *force majeure* provisions in petitioners' contracts was raised by the Court of Appeals *sua sponte* some nine months after oral argument, petitioners argued that the provisions in question did not moot the case. First, the Federal Circuit clearly misunderstood the impact of the contracts' *force majeure* clauses by concluding that these clauses released the parties from their obligations. The important fact is that the Secretary's decision unjustifiably deprived petitioners of their preexisting contract rights to earn substantial revenues by delivering the pipe under contract.

Therefore, petitioners retain a claim for damages against the United States if they prevail here. As the District of Columbia Circuit has clearly recognized in a substantially similar case, such a claim insures that this action remains a live case or controversy. Moreover, as in the same District of Columbia Circuit case, petitioners also present a classic case of the "capable of repetition,

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[8] Considering the record in short supply cases, such potential consequences are more than a theoretical possibility. As noted above, whereas there have been about 90 short supply requests for over 1.1 million tons of steel, only 37 requests for some 57,000 tons have been granted.

yet evading review" doctrine so often cited by this Court in countering mootness assertions.[9]

The Federal Circuit, without citation to any authority, refused even to consider these arguments.[10] This Court should grant this petition in order to resolve the conflict between the Federal and District of Columbia Circuits.

A. The Federal Circuit Opinion Conflicts With A Previous Opinion Of The District Of Columbia Circuit In A Substantially Similar Case

In *British Caledonian Airways v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981) (*"British Caledonian"*), various foreign airlines petitioned for review of an order of the Federal Aviation Administration ("FAA") prohibiting the operation of all DC-10 airlines within U.S. airspace, including those registered in foreign nations. There, the government argued, *inter alia*, that the case was moot since the order had been rescinded after commencement of the litigation. The court, *per* Robb, J., held that the possibility cited by the foreign airlines of recovering damages in an as yet unfiled action against the United States in the Court of Claims was enough to prevent the case from becoming moot.[11] Not only was the Court of Claims ex-

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[9] *See, e.g., Southern Pacific Terminal v. ICC*, 219 U.S. 498 (1911), *Roe v. Wade*, 410 U.S. 113 (1973).

[10] The Federal Circuit refused to consider petitioners' possible claim for damages as a bar to mootness, since the claim had not been presented to the trial court. However, at the time the trial court rendered its decision, AAPL had not yet met its supply requirements elsewhere and no suggestion of mootness on such grounds was made, or indeed could have been made. Moreover, petitioners could hardly have been expected to deal with the mootness implications of the potential damage claims in the trial court when it was the Federal Circuit which raised the mootness implications of the *force majeure* provisions *sua sponte* in a request for supplementary briefing some nine months after oral argument.

[11] The court further held that the case was not moot because it also satisfied the requirements of the "capable of repetition, yet evading review" doctrine.

pressly prohibited by statute from entertaining actions based on or inextricably bound up with alleged violations of international agreements, but, the court noted, the exclusive jurisdiction to review FAA orders rested with the courts of appeal.

The Federal Circuit ignored the holding in *British Caledonian* even though that case is indistinguishable from this one. As in *British Caledonian*, petitioners retain potential damage claims against the United States for the taking of property without the payment of just compensation, which can be pursued only in the Claims Court. Actions in that court, however, cannot be instituted until completion of the instant litigation, since the Court of International Trade has *exclusive* jurisdiction over challenges to the Secretary's decision under 28 U.S.C. § 1581(i),[12] but no authority to adjudicate petitioners' claims for damages. Moreover, as in *British Caledonian*, the Claims Court is barred by statute from adjudicating the merits of the Secretary's decision since petitioners' challenge is dependent upon alleged violations by the Secretary of the Arrangement—an international agreement. *See* 28 U.S.C. § 1502 (depriving the Claims Court of jurisdiction of any claim "growing out of or dependent upon any treaty . . .").[13] For this reason, petitioners cannot go to the Claims Court directly, but will be able to commence and maintain an action there after receiving a favorable judgment from the Court of International Trade.

This conflict with the District of Columbia Circuit threatens confusion in the mootness doctrine under which

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[12] The Claims Court has no jurisdiction over "any civil action within the exclusive jurisdiction of the Court of International Trade . . ." 28 U.S.C. § 1491(b).

[13] For purposes of this statute, international executive agreements are considered treaties, *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

this Court,[14] as well as other courts of appeal,[15] have long recognized that the possibility of recovering money damages prevents a case or controversy from becoming moot. For example, in *Powell v. McCormack*, 395 U.S. 486 (1969), Congressman Powell, who had been barred from taking his seat in the 90th Congress, sued, claiming his exclusion was unconstitutional. By the time this Court finished hearing the case, the 90th Congress terminated and Powell was seated in the 91st Congress. In answering a claim of mootness, this Court noted that Powell's viable claim for back pay prevented the case from becoming moot, 395 U.S. at 496. Most important, this Court rejected the argument that the case was moot because damages could not be awarded by the court in which suit was brought.

> The short answer to this argument is that it confuses mootness with whether Powell has established a right to recover against the Sergeant at Arms, a question which is inappropriate to treat at this stage of the litigation. 395 U.S. at 500.

Thus, Powell's potential claim for damages in another court was sufficient to avoid mootness. The Federal Circuit ignored this principle, directly contrary to the holding of *Powell*.

B. The Federal Circuit's Decision Is At Odds With This Court's Prior Decisions Holding Cases Involving Actions "Capable Of Repetition, Yet Evading Review" Not To Be Moot

In *Southern Pacific Terminal Co. v. ICC*, *supra*, this Court first enunciated the "capable of repitition, yet evad-

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[14] See, *e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978).

[15] See, *e.g.*, *Doe v. Anrig*, 692 F.2d 800, 804 (1st Cir. 1982), *Blameuser v. Andrews*, 630 F.2d 538, 539 n.1 (7th Cir. 1980), and *Duderwicz v. Sweetwater Savings Ass'n*, 595 F.2d 1008, 1015 n.11 (5th Cir. 1979).

ing review" doctrine.[16] Here, it is clear that petitioners present such a situation.

First, the arbitrary and capricious nature of the Secretary's action may be repeated many times. The United States has signed 20 separate VRAs restraining steel exports to the United States. All these agreements contain a short supply provision substantially similar to that in the Arrangement. Pursuant to these various short supply provisions, approximately 90 short supply requests, or about 3 per month, have been filed with the Commerce Department since January 1985. Since the VRAs do not expire until September 1989 and may even be extended further,[17] there can be no question that the Secretary has been and will be called on to make continuing short supply determinations.

Second, there is a clear risk that effective remedies cannot be provided in the event of repetition because the impact of the Secretary's action is of short duration. Being a snapshot of a given economic situation at a given point in time, the short supply decision process is inherently short term in nature. Indeed, were it not so, this would mean that once the Secretary had determined that a short supply existed, such condition of short supply would be deemed to continue indefinitely, clearly an absurd proposition.

Petitioners' claims have been in litigation for over two years. As a practical matter, purchasers having supply requirements and contractual obligations for delivery generally cannot wait an indeterminate amount of time before being assured of their source of supply. If a purchaser's reluctant decision, under the press of time, to obtain alternate supplies which do not meet its original specifications renders the cases moot before they can be

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[16] *See* also, *e.g.*, *Weinstein v. Bradford*, 423 U.S. 147 (1975), *California Coastal Comm'n v. Granite Rock Co.*, —— U.S. ——, 107 S. Ct. 1419 (1987).

[17] *Supra*, n.6.

fully litigated, and therefore insulates the Secretary's actions from judicial review, the Secretary will be able to treat short supply requests summarily and arbitrarily. This can then well have the effect of the Secretary, without any statutory authority, dictating to U.S. purchasers what and from whom they should be purchasing, rather than letting market conditions dictate these matters. On the other hand, permitting judicial review will allow foreign producers to obtain redress either in the form of an order permitting their imports, or of damages, in appropriate cases.

Third, there is a reasonable expectation that petitioners will be affected by future short supply denials. Petitioners are three major foreign manufacturers producing the whole range of steel products subject to the VRAs concluded with the E.C.[18] and are active exporters to the United States, responsible for over one million tons annually in shipments to the United States. Indeed, petitioner Sacilor and its affiliated companies are responsible for the single largest volume of imports of steel into the United States. Given the wide variety of VRA-covered steel products which they manufacture and their large volume of exports to the United States, there is at least a reasonable expectation that they will be making short supply requests to the Secretary of Commerce in the future.[19]

The Federal Circuit's failure to recognize the ongoing validity of the "capable of repetition, yet evading review" doctrine, as raised in this case, exacerbates the conflict between the Federal Circuit and the District of Columbia Circuit in *British Caledonian*. This Court should therefore grant this petition to resolve this conflict.

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[18] In addition to the Arrangement which applies to pies and tubes, the United States has concluded a VRA with the E.C. covering a wide range of carbon and specialty steel products, which also includes a short supply provision.

[19] See, *e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 434 n.5 (1980).

III. The Federal Circuit Has Erroneously Confused The Time Dimensions Of The Standing And Mootness Doctrines And Has Incorrectly Applied This Court's Standing Rules To The Instant Case

A. The Federal Circuit Has Erroneously Confused The Time Dimensions Of The Standing And Mootness Doctrines

While the mootness and standing doctrines on which the Federal Circuit based its decision both derive from the constitutional limitation on federal judicial power to actual "cases" or "controversies", they are separate doctrines that must be separately analyzed in the context of each case. Whether a case is analyzed in terms of standing or mootness depends on the point in time at which the inquiry is made. The two doctrines cannot apply simultaneously to facts arising after the commencement of a litigation.

Under *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (*"Valley Forge"*), to satisfy the constitutional aspects of the standing doctrine, a complainant must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, that the injury fairly can be traced to the challenged action and that it is likely to be redressed by a favorable decision. 454 U.S. at 472, *citing Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and *Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

When standing is placed in issue, "the question is whether the person whose standing is challenged is the proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." [20] As this Court has noted, mootness is:

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[20] *Flast v. Cohen*, 392 U.S. 83, 100 (1968). In analyzing a plaintiff's standing, the justiciability of the claim is assumed. *Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

> "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." [21]

The Federal Circuit has ignored this elemental distinction [22] in its application of the criteria for satisfying the constitutional aspects of the standing doctrine by denying standing on grounds of mootness. While conceding that petitioners suffered an injury in fact that was 'fairly' traceable to the challenged action, the court below found that petitioners failed to satisfy the "redressability" requirement of the standing doctrine because AAPL was no longer obligated to purchase petitioners' pipe.[23]

It is undisputed that at the time petitioners commenced the instant actions, AAPL had not purchased alternate supplies of pipe and that it was obligated to purchase petitioners' pipe. A reversal of the Secretary's denial based on petitioners' suits would clearly have resulted in petitioners shipping the pipe and AAPL using it, thus satisfying standing redressability at the outset

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[21] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) quoting Monaghan, "Constitutional Adjudication: The Who and When," 82 *Yale L.J.* 1363, 1384 (1973).

[22] This Court has recognized that the distinction between standing and justiciability has not always appeared with clarity in prior cases. *Flast v. Cohen, supra*, at 100 n.18.

[23] The court also reasoned that even if such an obligation existed, the redressability requirement was not satisfied since export of the pipe would be contingent on receipt from the E.C. of the necessary export licenses and there was nothing in the record indicating that the E.C. would issue the licenses. This analysis indicates a complete lack of understanding of the short supply process. As was explained below, the approval of a short supply request allows imports in excess and outside of previously agreed quota levels. Such imports are covered by a special license which is *automatically* issued by the E.C. upon approval by the Commerce Department of the request. Thus, there can be no question that if a request is approved, the necessary export license is issued as a matter of course.

of the litigation. If, after commencement of the litigation, AAPL fulfilled its supply requirements elsewhere, that might be an argument that the case was moot,[24] but it does not destroy the standing redressability established at the commencement of the litigation.

The Federal Circuit's failure to recognize the distinction between standing redressability and mootness undermines the efforts made by this Court in recent years to shape more precisely the admittedly uncertain contours of, and interrelationship between, the standing[25] and mootness doctrines.[26] Unless corrected, the Federal Circuit's opinion will promote confusion and misunderstanding in a basic constitutional area that has at times baffled litigants and commentators alike. This petition should therefore be granted.

B. The Federal Circuit Has Misinterpreted And Misapplied This Court's Decisions On The Prudential Aspects Of The Standing Doctrine

This Court has set forth the relevant criteria for satisfaction of the prudential aspects of the standing doctrine in cases such as this which involve APA challenges to agency action taken under a particular statute. First,

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[24] For the reasons noted, *supra*, at 11-16, such an argument must fail.

[25] "We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . ." *Valley Forge* at 475. *See* also *Flast v. Cohen, supra*, at 99, quoting Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. 498 (1966) (statement of Prof. Paul A. Freund).

[26] While the justiciability doctrine in general is "one of uncertain and shifting contours," *Flast v. Cohen, supra*, at 97, in mootness inquiries the range of factual questions which require consideration is even greater than in other justiciability cases. Note, "The Mootness Doctrine In The Supreme Court," 88 *Harvard L. Rev.* 373, 377-78 (1974).

is the interest sought to be protected by the complainant arguably within the zone of interests to be protected *or regulated* by the statute or constitutional guarantee in question? [27] Second, is judicial review for the complainant precluded, either expressly by Congress, or implicitly by the statutory scheme established by the Congress? [28]

This Court, in *Clarke v. Securities Industry Ass'n*, —— U.S. ——, 107 S. Ct. 750, 758 (1987), noted that the key issue is basically one of Congressional intent and all indicators helpful in discerning that intent must be weighed. In this regard, the courts are not limited to consider the specific provision involved, but must consider any provision that helps to understand Congress' overall purposes. 107 S. Ct. at 758. The clear rule is that:

> [a] separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review.[29]

Indeed, as *Clarke* makes clear, the fact that judicial review is sought under the APA as opposed to another stat-

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[27] *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (*"Data Processing"*). While many cases dealing with the prudential aspects of the standing doctrine as set forth in *Camp* have concentrated on the zone of interests *protected*, it is clear that the existence of a zone of interests *regulated* will satisfy the prudential requirements no less completely. *Colonial Penn Insurance Co. v. Heckler*, 721 F.2d 431, 435 (3rd Cir. 1983), *Cotovsky-Kaplan Physical Therapy Ass'n Ltd. v. United States*, 507 F.2d 1363, 1366 (7th Cir. 1975).

[28] *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-46 (1984) (*"Block"*); 5 U.S.C. § 701(a)(1).

[29] *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. ——, 106 S. Ct. 2860, 2866 (1986).

ute makes it easier to satisfy the prudential aspects of the standing doctrine.[30]

Here, as recognized by the Court of International Trade, there can be no doubt that petitioners and their exports to the United States are *regulated* by the SISA and its short supply provisions.[31] Further, there can be no doubt that Congress did not expressly preclude foreign manufacturers from challenging short supply determinations. However, the Federal Circuit found that the SISA's short supply provisions were designed to protect domestic purchasers of steel products and that it would be contrary to the entire purpose of the SISA to allow foreign producers to challenge a decision made pursuant to a regulatory scheme designed to protect American steel producers from foreign imports.

While off-handedly citing *Clarke*, the Federal Circuit's analysis misread that decision by focusing too narrowly on the legislative history of just the specific short supply provisions of the SISA.[32] It failed to take proper account of Congress' overall purposes, the statutory scheme of the SISA as a whole, its objectives, and the nature of the administrative action involved, which this Court has

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[30] 107 S. Ct. at 758, n.16.

[31] Petitioners are not only manufacturers of steel products and exporters of such products to the United States, but also maintain steel importing subsidiaries. Furthermore, the short supply request in question derives from contracts to ship steel pipe to the United States entered into before enactment of the SISA and the conclusion of the Arrangement. But for the SISA, the Arrangement and the Secretary's denial, petitioners would have been free to perform under their contracts.

[32] H.R. Rep't No. 98-1156, 98th Cong., 2d Sess. 200 (1984) states that the SISA's short supply provisions were enacted to protect domestic purchasers of steel products. However, nowhere in the statute or legislative history is there any indication that Congress intended to preclude foreign manufacturers from seeking review of a short supply denial.

determined to be the relevant inquiries.[33] It also completely ignored the fact that judicial review is being sought under the "generous review provisions" of the APA.[34]

The statutory scheme makes it clear that the SISA was enacted not primarily for the benefit of U.S. purchasers, but to help U.S. steel producers overcome the harmful effects of *unfair* foreign trade practices, such as subsidization and dumping and the *unfair* competition arising therefrom.[35] Nothing in these purposes can be taken as providing "clear and convincing evidence" of Congress' intent to preclude review of challenges by foreign manufacturers "adversely affected" or "aggrieved" by denials of requests to allow imports of products ("agency action") which, by definition, cannot be supplied by U.S. producers and therefore do not compete with domestically produced steel.

The Commerce Department, by accepting for consideration requests filed by foreign producers, has recognized this very point. Indeed, under many of the VRAs, a separate appendix sets forth the particular information

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[33] *Data Processing*, 397 U.S. at 157, *Clarke*, 107 S. Ct. at 758, and *Block*, 467 U.S. at 345.

[34] *Data Processing*, 397 U.S. at 156.

[35] The SISA states that the Congress finds that: the ability of the domestic steel industry to be internationally competitive is impeded by the effects, *inter alia*, of serious injury due to imports of, and subsidies, dumping, and the use of other *unfair* and restrictive foreign trade practices regarding steel products (§ 802(a)(2)); the extensiveness of the *unfair* trade practices engaged in the international market regarding such products imposes unusually harsh burdens on the United States steel industry in combating those practices through the trade remedy laws (§ 802(a)(3)); and, expeditious and effective action under the President's national policy for the steel industry, including more vigorous efforts by the Executive Branch to self-initiate and pursue remedies against those practices, is needed to eliminate the adverse effects of those *unfair* trade practices (§ 802(a)(4)) (emphasis added).

foreign producers must include in their short supply requests.

Approximately 15% of the short supply requests filed since January 1, 1985, have been made by foreign producers. These requests have been processed and considered by the Commerce Department in the same manner as requests filed by U.S. purchasers. Since the Commerce Department has been charged with the implementation of the SISA's short supply provision, the courts should extend the greatest deference to the manner in which it has exercised its responsibilities.[36] Congress itself, in reviewing the operations of the steel VRA program, has recognized that foreign exporters may submit short supply requests.[37]

Since foreign producers already participate actively in the short supply process by filing short supply requests and by having such requests considered, it can hardly be said that allowing such producers to sue the Secretary would severely disrupt this administrative scheme. Unlike the case in *Block*, where access to the administrative remedies was restricted, here, foreign producers and U.S. purchasers have equal access to the short supply process.

C. Whether Or Not Petitioners Have Standing To Pursue Their Claims Under The SISA, The Arrangement And The APA, Petitioners Have Standing Under The Fifth Amendment Takings Clause

In addition to their claims based upon the SISA, the Arrangement, and the APA, petitioners also have claims founded on the Fifth Amendment's Takings Clause. Even assuming, *arguendo*, that petitioners do not have standing under the SISA, the Arrangement and the APA, they clearly have standing under the Fifth Amendment.

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[36] *Board of Governors of Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 56-57 (1981).

[37] H.R. Rep't No. 99-937, *supra*, at 12.

Petitioners are alien friends entitled to protection under the Fifth Amendment Takings Clause. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), *Russian Volunteer Fleet Co. v. United States*, 282 U.S. 481 (1931). As holders of valuable contract rights which preexisted the enactment of the SISA and the conclusion of the Arrangement, which rights were rendered valueless as a direct result of the Secretary's denial, they held private property compensable under that clause. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Lynch v. United States*, 292 U.S. 571 (1934), *cited* with approval in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

For these reasons, petitioners fall within the zone of interests protected or regulated by the Fifth Amendment Takings Clause [38] and thus have standing.[39]

IV. The Confusion Generated By The Federal Circuit's Opinion Is Particularly Serious Because The Federal Circuit Has Exclusive Appellate Jurisdiction To Consider International Trade Disputes And Challenges To Denials Of Short Supply Request

As noted above, the Court of International Trade has *exclusive* jurisdiction to consider judicial challenges to denials of short supply requests. The Court of Appeals for the Federal Circuit has *exclusive* jurisdiction to entertain appeals from opinions of the Court of International Trade. 28 U.S.C. § 1295(a)(5).

In this light, the confusion generated by the Federal Circuit's opinion is particularly serious. Not only will litigants in international trade cases be saddled with con-

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[38] *Data Processing*, 397 U.S. at 153.

[39] As noted, *supra*, at 13, a judgment by the Court of International Trade that the Secretary of Commerce's short supply denial was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law is a prerequisite to a Claims Court action for violation of the Takings Clause.

fusing and conflicting rules on standing and mootness, but absent this Court's intervention, foreign steel manufacturers will continually be subject to the arbitrariness and capriciousness of an unreviewable short supply process without the opportunity to test the validity of the Federal Circuit's opinion in any other circuit.

CONCLUSION

For the reasons stated herein, petitioners respectfully request this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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July 13, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2706

SACILOR, ACIERIES ET LAMINOIRS de LORRAINE
BERGROHR-HERNE and VALLOUREC,
Appellants,

v.

UNITED STATES OF AMERICA, MALCOLM BALDRIDGE,
SECRETARY OF COMMERCE, and the UNITED STATES
DEPARTMENT OF COMMERCE,
Appellees.

JUDGMENT

On Appeal from the Court of International Trade
in Case Nos. 85-5-00664, 85-5-00669

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

VACATED AND REMANDED

Dated Mar. 31, 1987

Entered by Order of the Court

/s/ Francis X. Gindhart
FRANCIS X. GINDHART,
Clerk

Issued as a Mandate: Apr. 22, 1987

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-2706

SACILOR, ACIERIES ET LAMINOIRS de LORRAINE
BERGROHR-HERNE and VALLOUREC,
Appellants,

v.

UNITED STATES OF AMERICA, MALCOLM BALDRIDGE,
SECRETARY OF COMMERCE, and the UNITED STATES
DEPARTMENT OF COMMERCE,
Appellees.

DECIDED: March 31, 1987

Before RICH, BISSELL, and ARCHER, *Circuit Judges.*
BISSELL, *Circuit Judge.*

This appeal is from the order of the Court of International Trade, 613 F. Supp. 364 (Ct. Int'l. Trade 1985), dismissing the cases of plaintiffs-appellants Sacilor, Acieries et Laminoirs de Lorraine; Bergrohr-Herne; and Vallourec (collectively Sacilor) for failure to state a cause of action under the substantive law and for unavailability of judicial review under the Administrative Procedure Act (APA). We vacate and remand for the trial court to dismiss the cases for lack of jurisdiction.

BACKGROUND

Appellants are three European producers of steel pipe who contracted with the All-American Pipeline Company

(AAPL) in September 1984 to supply 320,000 tons of a particular steel pipe for the "California-Texas Pipeline" built by AAPL. The export of steel pipe from Europe to the United States is governed by the Steel Import Stabilization Act (SISA), Title VIII of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2998, enacted October 30, 1984, subsequent to Saciior's contracting with AAPL. The SISA, 19 U.S.C. § 2253, *inter alia*, authorizes the Secretary of Commerce to ensure that export of pipe and tube by the European Economic Community (EEC) does not exceed levels agreed to between the United States and the EEC as set forth in the Arrangement on European Communities' Export of Pipes and Tubes to the United States of America (Arrangement). Both the initial Arrangement and all modifications and clarifications control the export of pipes and tubes to the United States.

By an exchange of letters on October 21, 1982, the United States and the EEC initially agreed that the EEC would establish measures to ensure that the annual export of pipes and tubes to the United States would not exceed the 1979-80 average share of annual United States apparent consumption. *See* United States-European Communities Steel Pipe and Tube Imports Agreement: Hearings before the Subcommittee on International Trade of the Senate Finance Committee, 98th Cong., 1st Sess. 58 (1983). On January 10, 1985, another exchange of letters between the United States and EEC clarified the October 21, 1982 Arrangement.

As clarified, the Arrangement provides in article 1 that the EEC shall restrain exports of steel pipes or tubes to a level of 7.6 percent (10 percent of "oil country tubular goods" per article 2) of United States apparent consumption for the calendar years 1985 and 1986. The EEC agreed to issue export licenses as the mechanism of restraint and published the pertinent regulations in 28 O.J. Eur. Comm. (No. L. 9) 13-31 (1985).

Both the SISA and the Arrangement provide for the export of additional steel pipes and tubes over the agreed levels if the Secretary of Commerce determines that a "short supply" or "emergency market situation" exists in the United States. The Arrangement establishes in article 8 that the EEC may request such a determination. Article 8 also provides that, once the Secretary does conclude a short supply exists, the United States must allow importation of the additional steel pipes and tubes.

Pursuant to article 8, on January 21, 1985, the EEC submitted a request for a short supply exemption, specifically for the AAPL project. The Secretary of Commerce examined the request, solicited comments (50 Fed. Reg. 4719-20 (1985)), sent questionnaires to potential United States producers, and met with officials of AAPL, which wished to import the pipe. On March 28, 1985, the Secretary denied the short supply exemption and so informed the EEC and AAPL by letter, explaining that he had determined that three United States producers, with combined unused capacity for the product of about one million tons, could meet AAPL's needs.

On May 13, 1985, Sacilor commenced suit in the trial court, claiming that the Secretary's determination was arbitrary, capricious, and a denial of its due process rights. On June 18, 1985, the United States agreed to admit 100,000 tons of pipe for the AAPL project in addition to the levels of imports permitted under the Arrangement. After this appeal was filed, the parties informed the court that the contract between Sacilor and AAPL contains a *force majeur* clause which "insulates appellants from liability to the Buyer for non-delivery." Appellants' Supp. Brief at 2. The parties also informed the court that AAPL has received from domestic and foreign producers "all the line pipe required for the AAPL project." Appellees' Supp. Brief at 6.

The Trial Court's Decision

After predicating jurisdiction on 28 U.S.C. § 1581 (i) (4) in relation to 28 U.S.C. § 1581 (i) (3),* the trial court determined that neither section 805 of the SISA nor the Arrangement established direct, affirmative, and judicially enforceable rights for private parties in Sacilor's position. The SISA's legislative history demonstrates, the court said, that the short supply provision was "designed to protect domestic producers of steel products . . . ." H.R. Rep. No. 1156, 98th Cong. 2d Sess. 200, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5220, 5317. The terms of the Arrangement indicates that it binds only the signatory parties—the United States and the EEC.

As to judicial review, the trial court stated that 28 U.S.C. § 2631 (i) permits parties to commence actions in the Court of International Trade, once jurisdiction is established, if they are adversely affected or aggrieved within the meaning of the APA. The trial court found the requisite "injury in fact" in Sacilor's alleged economic injury resulting from the SISA's restrictions and the requisite interest within the "zone of interest" in

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* Section 1581(i) provides, in pertinent part:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> . . . .
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

the partial exclusion of Sacilor's product from importation because of the SISA and the agreements permitted by the SISA.

The trial court, however, declined to review the Secretary's decision, finding that decision to be an agency action committed by law to the agency's discretion under 5 U.S.C. § 701(a)(2). The trial court determined that, because the decision on lack of a short supply was *part of the foreign affairs process*, the type of review sought by Sacilor would necessarily involve an "impermissible intrusion into a discretionary decision-making process." The trial court concluded that it was inappropriate to review the Secretary's determination and held, therefore, that it was not subject to judicial review.

Finally, as to Sacilor's due process claim, the trial court determined that because (1) neither the SISA nor the Arrangement provided a private right of action and (2) there is no generally available protectable interest to engage in foreign trade, the lack of a hearing on the short supply determination was not a violation of due process.

OPINION

In our view, the trial court lacked jurisdiction over these cases because, as the United States asserts, Sacilor lacks standing to raise the claims, and because Sacilor's claims are moot.

Sacilor lacks standing to challenge the Secretary's determination. The Supreme Court's recent cases have recognized that the standing doctrine has both constitutional and prudential aspects. *Allen v. Wright*, 468 U.S. 737, 751 (1984). As with the related doctrine of mootness, the constitutional aspect of standing is grounded in the Article III requirement of a case or controversy. U.S. Const. art. III, § 2. To satisfy this aspect of the standing doctrine, the plaintiff must not only have experienced some concrete injury-in-fact, but "[t]he injury must be

'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." *Allen v. Wright*, 468 U.S. at 751 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)). Assuming that Sacilor has sustained the required injury-in-fact, as a result of the Secretary's determination, it is not clear that relief would be likely to follow from a favorable decision in this case. AAPL is no longer obligated to purchase Sacilor's pipe. Even if such an obligation existed, export of the pipe would be contingent on receipt from the EEC of the necessary export licenses. There is nothing in the record before us indicating that the EEC would issue the licenses to Sacilor.

The prudential aspect of the standing doctrine is no less troublesome. In the administrative context, this aspect of the doctrine is derived from the requirement of section 702 of the APA that a plaintiff challenging agency action must be "adversely affected or aggrieved." 5 U.S.C. § 702 (1982). The question turns on whether " 'the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Clarke v. Securities Indus. Assn.*, 107 S. Ct. 750, 755 (1987) (quoting *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)). In applying this "zone of interest" test, the Court stated: "The essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Id.* at 757 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984)).

Although Sacilor's interests are arguably regulated by section 805(b)(3) of the SISA, it does not appear that Congress intended to rely on foreign manufacturers to challenge administrative application of American import laws. As the trial court correctly observed, the legislative

intent behind section 805(b)(3) was to protect domestic purchasers of steel products. H.R. Rep. No. 1156, 98th Cong., 2d Sess. 200, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5220, 5317. Clearly AAPL would have had standing to challenge the Secretary's determination, but it would be contrary to the entire purpose of the Act to allow foreign producers to challenge a decision made pursuant to a regulatory scheme designed to protect American steel producers from foreign imports. SISA § 802.

Alternatively, Sacilor's claims are moot. When Sacilor brought its action before the trial court, it sought a judicial reversal of the Secretary's determination that certain pipe was not in short supply. Sacilor had a contract to sell such pipe to AAPL and presumably would have delivered the pipe if it could have obtained the required EEC export licenses and if the Secretary had found the pipe to be in short supply. Sacilor and AAPL were released from their obligations under the contract by virtue of the contract's *force majeur* provision. After the suit was filed, AAPL obtained elsewhere the pipe it needed to complete the pipeline. Sacilor does not dispute this fact.

The goal of the suit was to allow Sacilor to export pipe to the United States to fulfill its obligation to AAPL. Since AAPL now has the required pipe and the contractual obligations of Sacilor and AAPL are a nullity, there is no live case or controversy to be resolved by Sacilor's suit. *See Burke v. Barnes*, 107 S. Ct. 734 (1987). Sacilor argues that the possibility of recovery of money damages against the Secretary in a suit in the Claims Court on a Fifth Amendment taking theory or in a district court under the Federal Tort Claims Act presents a sufficiently live controversy for this court to decide the present case. We do not agree. No such claims were presented to the trial court and this court will not render an advisory opinion on claims that were not or could not be raised below.

For these reasons, we vacate the trial court's judgment and remand for entry of judgment dismissing the cases for lack of jurisdiction.

Because of our decision on the standing and mootness issues, it is unnecessary to address appellants' other arguments on the question, decided in the affirmative by the trial court, whether judicial review of the Secretary's determination was unavailable because it involved a foreign affairs function and was, therefore, committed to agency discretion by law. We note, however, that the analysis of a similar question by the Supreme Court in *Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 2860, 2865-66 (1986), which was decided after the trial court decided this case, would apply.

VACATED AND REMANDED

APPENDIX C

Slip Op. 85-66

UNITED STATES COURT OF
INTERNATIONAL TRADE

Before: RESTANI, JUDGE

Court No. 85-5-00664

SACILOR, ACIERIES et LAMINOIRS de LORRAINE, *et al.*,
Plaintiffs,

v.

THE UNITED STATES, *et al.*,
Defendants.

Court No. 85-5-00669

VALLOUREC,
Plaintiff,

v.

THE UNITED STATES, *et al.*,
Defendants.

OPINION AND ORDER

[Judgment of dismissal.] Decided: June 21, 1985

Donovan, Leisure, Newton & Irvine (Pierre F. de Ravel d'Escalapon, Thomas R. Trowbridge, III, and *Melvin S. Schwechter*) for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch,

Velta A. Melnbrencis, Civil Division, United States Department of Justice, for defendants.

Stewart & Stewart (*Eugene L. Stewart* on the brief) for *amicus curiae* Bethlehem Steel Corporation.

RESTANI, Judge: Plaintiffs, European manufacturers of made-to-order steel pipes for crude oil pipelines, filed these actions to challenge a Department of Commerce (DOC) determination. The determination denied a request by the European Economic Community (EEC) to allow the importation into the United States of additional quantities of pipe beyond the level specified in an agreement between the EEC and the United States. Plaintiffs moved for expedited discovery and briefing. Defendant United States government opposed the motion and requested briefing on several threshold questions including jurisdiction, standing, justiciability, and judicial review. After briefing and oral argument, the court has determined that plaintiffs failed to state a cause of action under the substantive law and that judicial review of the findings of the DOC is unavailable.

I. *Background*

In September, 1984, plaintiffs executed final contracts with the All American Pipeline Company to supply specially made pipe for a project designed to transport crude oil from California to the Gulf Coast. Plaintiffs were selected as suppliers after an open bidding process. On October 30, 1984, the Trade and Tariff Act of 1984, Pub. Law 98-573, 98 Stat. 2948 was enacted. Included as Title VIII of the 1984 Trade and Tariff Act was the Steel Import Stabilization Act (SISA), 19 U.S.C.A. § 2253 note (West 1980 & Supp. 1985). Section 805(b) of SISA grants power to the Secretary of Commerce (Secretary) to insure that the quantities of imported pipes and tubes remain in accordance with an October 1982 agreement between the EEC and the United States,

"including any modification, clarification, extension or successor agreement . . . ." [1] Also contained within § 805 (b) was a provision which permits the Secretary to allow the importation of additional quantities of certain products after the Secretary finds the existence of a short supply of the product in the United States.[2]

On January 10, 1985, by way of letters, the EEC and the United States entered into a clarifying agreement concerning steel imports (the Arrangement). Under the

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[1] Specifically, section 805(b)(1) of Title VIII of the Trade and Tariff Act of 1984 (Steel Import Stabilization Act), Pub. Law 98-573, 98 Stat. 2948, 19 U.S.C.A. § 2253 note (West 1980 & Supp. 1985) (SISA), provides in applicable part:

> In connection with the provisions of the Arrangement on European Communities' Export of Pipes and Tubes to the United States of America . . . including any modification, clarification, extension, or successor agreement thereto (collectively referred to hereinafter as 'the Arrangement'), the Secretary of Commerce is authorized to request the Secretary of the Treasury to take action pursuant to paragraph (2) of this subsection whenever he determines that—
>
> > "(A) the level of exports of pipes and tubes to the United States from the European Communities is exceeding the average of annual United States apparent consumption specified in the Arrangement, or
> >
> > "(B) distortion is occurring in the pattern of United States-European Communities trade within the pipe and tube sector . . . .

[2] Section 805(b)(3) of SISA provides:

> Nothing in this subsection may be construed as prohibiting the Secretary of Commerce from permitting the importation of additional quantities of specific products in cases where the Secretary determines that conditions of short supply or emergency economic situations related to market demand exist; except that a short supply or emergency economic situation shall not be considered to exist solely because domestic producers are unwilling to supply products at prices below their costs of production (as determined by the Secretary of Commerce).

Arrangement the EEC would restrain exports to, or destined for consumption in the United States of certain steel pipes and tubes to a level of 7.6% of U.S. apparent consumption for the years 1985 and 1986. For oil country tubular goods the limit was 10% of U.S. apparent consumption. Article 8 of the Arrangement, however, provides that pipe and tube exports above the specified limits will be accepted where a shortage of supply exists.[3]

Pursuant to the Arrangement, the EEC submitted a request to the DOC for consultation and a short supply exemption for the pipe required by the All American Pipeline project. Asking for priority treatment, the EEC claimed that the requisite product was not sufficiently available in the United States.

The DOC announced that it would examine the short supply exemption request and invited comments by February 15, 1985. 50 Fed. Reg. 4719 (1985). By letters dated March 28, 1985, the DOC informed both the EEC and the president of All American Pipeline Company that the pipe subject to the EEC's request could be supplied

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[3] Article 8 of the Arrangement provides:

> The U.S. shall accept exports of pipes and tubes in addition to those permitted under section 1 and 2 where a shortage of supply is identified, i.e., where the U.S. industry is unable to meet demand in the USA for a particular product. At the request of the EEC, on the basis of information received from U.S. consumers, consultations shall take place between the EEC and the U.S. authorities. If necessary, the advice of an independent expert may be sought by either party.
>
> The U.S. shall make a decision under this section on the basis of objective evidence from all relevant sources within a maximum of sixty days from the date of the request for consultations.
>
> The US recognizes that priority should be given to the examination, under the "short-supply" provisions of this Arrangement, of requests concerning contracts recognized to have been already concluded between USA and EC enterprises and which are in course of execution in connection with large projects.

by three firms in the United States which had unused capacity of approximately one million tons, several times the amount of pipe covered by the requests. The DOC noted that its determination was based on responses to questionnaires sent to all U.S. producers, responses to the notice in the Federal Register, and consultations with All American Pipeline officials and their private consultant.

On May 13, 1985, manufacturers Sacilor and Bergrohr-Herne commenced an action in this court claiming that the DOC's March 28, 1985 determination was arbitrary, capricious, an abuse of discretion, and a denial of plaintiffs' due process rights. Plaintiff Vallourec filed a companion case on the same grounds.

As of June 18, 1985, it appears that the EEC and the United States have resolved their differences regarding pipes and tubes for the All American Pipeline. Defendants assert that this action is now moot. Plaintiffs have indicated that the amount approved for importation is less than that sought by plaintiffs, and therefore this action is not moot. This action remains a live controversy between the parties before the court.

II. *Jurisdiction*

Jurisdiction is predicated on 28 U.S.C. § 1581(i)(4) (1982) as it relates to 28 U.S.C. § 1581(i)(3) (1982).[4]

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[4] 28 U.S.C. § 1581(i) (1982) reads as follows:

§ 1581. Civil actions against the United States and agencies and officers thereof

. . . (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

These cases involve the administration of a law, SISA, imposing quantitative restrictions on certain steel imports. Defendant asserts that plaintiffs' claims rest only on the Arrangement, which it asserts does not have the force of law. It appears that executive international agreements, whether approved prior or subsequent to execution, have the force of law. *Cf. Weinberger* v. *Rossi*, 456 U.S. 25 (1982); *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912). In any case, plaintiffs also claim that their actions arise under SISA because it incorporates various parts of the Arrangement. This court's task then is to determine whether SISA gives plaintiffs the relief they seek, or whether Article 8 of the arrangement in some manner confers rights on the plaintiffs. Under § 1581(i) the court has power to make this inquiry. Furthermore, because plaintiffs have no reasonably available remedy under § 1581(a), failure to exhaust administrative remedies will not bar suit. *See American Association of Exporters Importers-Textile and Apparel Group* v. *United States*, 751 F.2d 1239, 1244-1246 (Fed. Cir. 1985) (hereafter *AAEI*); *see also American Institute for Imported Steel, Inc.* v. *United States*, 8 CIT ——, 600 F. Supp. 204, 208 (1984).

III. *Enforceable Private Rights*

Section 802 of SISA states that the purpose of the act is to grant the President authority to enforce bilateral steel agreements and to condition the continuation of his

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(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

authority on modernization of domestic steel production facilities. When referring in SISA to the Secretary's duties regarding the short supply exception to the quota levels set in the bilateral agreements, Congress used permissive language. Section 805(c)(3) states that the Secretary may permit importation of additional quantities of steel products into the United States. SISA contains no mandatory language regarding short supply except perhaps for a provision prohibiting a short supply determination based on unavailability of domestic steel at below cost prices. This limit on the short supply exemption is not involved here.

Although Article 8 of the Arrangement is written in mandatory terms, its terms bind only the signatory parties, the United States and the EEC. It is only the EEC which can request relief under Article 8 of the Arrangement. For an international agreement to be enforceable by private parties, either the agreement itself or the implementing legislation must contain language providing for the determination of private rights. *Dreyfus* v. *Von-Fink*, 534 F.2d 24, 29-30 (2nd Cir. 1976); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3563 (2nd ed. 1984). Unlike the case of *People of Saipan* v. *United States*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (United Nations Trusteeship Agreement created substantive rights enforceable by plaintiffs), there is no language in either Article 8 of the Arrangement or § 805(b)(3) of SISA which indicates an intention to establish direct, affirmative, and judicially enforceable rights for private parties in the position of plaintiffs.

The legislative history of SISA also fails to support plaintiffs. It states that the short supply provision is "designed to protect domestic purchasers of steel products . . . ." H.R. Rep. No. 1156, 98th Cong., 2d Sess. 200, *reprinted in* 1984 U.S. Code Cong. & Ad. News 5220, 5317. There is no mention of guaranteeing persons in the position of plaintiffs any access to United States markets.

IV. *Standing*

The substantive laws of the United States provide plaintiffs no specific rights of action in this situation, but because the court has subject matter jurisdiction, review may lie under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706 (1982). *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 (1979); *Audubon Society* v. *Lee*, 742 F.2d 901, 911 n.18, *reh'g denied*, 750 F.2d 69 (5th Cir. 1984); *McCartin* v. *Norton*, 674 F.2d 1317, 1320 (9th Cir. 1982); *Glacier Park Foundation* v. *Watt*, 663 F.2d 882, 885 (9th Cir. 1981). Under 28 U.S.C. § 2631(i) (1982) plaintiffs may commence actions in this court if they are "adversely affected or aggrieved by agency action within the meaning of section 702 of title 5." "In order to assert a cognizable claim—or 'standing to sue'—under the APA, a plaintiff must demonstrate that it has suffered or will suffer 'injury in fact' sufficient to establish [constitutional] Article III standing and that the alleged injury to an interest is 'arguably within the zone of interests protected or regulated' by the statute that has allegedly been violated." *Dialysis Centers, Ltd.* v. *Schweiker*, 657 F.2d 135, 138, (7th Cir. 1981) (*citing United States* v. *SCRAP*, 412 U.S. 669, 686 (1975)). *See also Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Florsheim Shoe Co.* v. *United States*, 744 F.2d 787, 790-92 (Fed. Cir. 1984); *Port of Astoria, Oregon* v. *Hodel*, 595 F.2d 467, 474 (9th Cir. 1979).

In *Australian Meat and Live Stock Corp.* v. *Block*, 7 CIT ——, 590 F. Supp. 1230 (1984), this court found that Austrialian meat exporters alleged economic injury in fact in challenging laws involving voluntary restraint agreements and quotas. The steel producers here allege similar injury as a result of SISA, and, thus, likely satisfy the constitutional aspect of the standing requirement.

The prudential, that is, the "zone of interests," aspect of standing is not as easily met. In making a "zone of interests" examination, courts generally look to the "language of the relevant statutory provisions and their legislative history." *Control Data Corp.* v. *Baldridge*, 655 F.2d 283, 294 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 881 (1981) (footnotes omitted). A review of the applicable statute in these cases, SISA, does not indicate that the business prospects of foreign manufacturers are protected by that act. SISA speaks only of meeting short supply situations. The legislative history of SISA's short supply provision demonstrates that the provision was enacted only to protect American firms which are consumers of steel products. H.R. Rep. No. 1156. Moreover, unlike the statute in the *Australian Meat* case, SISA does not protect importers by creating a minimum level which could not be kept *out* of the United States. Rather, the statute provides a possible exception to increase a maximum allowable level of imports based on American industry's needs.

The prudential test of standing set forth in *Association of Data Processing Service Organizaitons, Inc.* v. *Camp*, 397 U.S. 150, 153-57 (1972), however, contains alternative requirements. "The applicable 'zone' covers interests regulated as well as protected by the statute in question." *Community Nutrition Institute* v. *Bergland*, 493 F. Supp. 488, 492 (D.D.C. 1980). The *Community Nutrition* court held that soft drink manufacturers whose products were not approved by federal school lunch regulations had standing to challenge the regulations even though the purpose of the legislation on which the regulations were based was to provide nutritious food to children. When their products were excluded from the school lunch program, the manufacturers were regulated by the relevant act. In the instant cases, plaintiffs' product is partially excluded from importation because of SISA and the agreements permitted by SISA. The foreign manufacturers are thus arguably regulated by the relevant stat-

ute. Accordingly, the prudential test of standing is met in these cases and plaintiffs, therefore, satisfy both standing requirements.

V. *Judicial Review*

"Apart from the question of standing to sue, [the court's] inquiry into the availability of judicial review requires a separate examination of whether Congress has placed [the Secretary's] action beyond the reach of judicial cognizance." *Concerned Residents of Buck Hills Falls* v. *Grant*, 537 F.2d 29, 34 (3rd Cir. 1976). Thus, the final question remaining is whether these cases fall within the exception to APA review for agency action committed to agency discretion by law. 5 U.S.C. § 701(a) (1982). The court finds that the type of judicial review sought by plaintiffs is unavailable in these cases.

First, these cases concern a decision by the Secretary which involves both foreign affairs and domestic matters. Congress could have set up procedures for decision-making on short supply issues which limit the Secretary's discretion and which involve no foreign affairs function, but it did not do so. Congress placed the short supply provision in a statute which is largely concerned with bilateral agreements between the United States and steel-exporting nations, and it used no words to remove the short supply decision-making function from the general process of consultation between the involved governmental bodies. Although the Arrangement includes certain minimal standards which govern the consultations on short supply, those standards are not part of the statute for the purpose of determining the scope of judicial review. *See AAEI*, 751 F.2d at 1248, *Mast Industries, Inc.* v. *Regan*, 8 CIT ——, 596 F. Supp. 1567, 1576 (1984).

Congress recognized the foreign affairs, discretionary nature of a short supply determination by neither setting forth in § 805(b)(3) standards which the Secretary must

apply, nor requiring publication of specific findings.[5] Because it is unrestricted, § 805(b)(3) permits the Secretary to make a short supply determination by any reasonable means, including the consultations between governmental bodies envisioned in Article 8 of the Arrangement. Consultations between this government and foreign powers are foreign affairs matters. The indication in the legislative history that the purpose of § 805(b)(3) is to protect domestic purchasers does not override the permissive nature of the provision and the overall statutory scheme, which places the decision here in the foreign affairs arena.[6] Where foreign affairs and domestic matters are mixed, Congressional delegation must be broadly construed. *Florsheim Shoe Co.* v. *United States*, 744 F.2d 787, 793 (Fed. Cir. 1984) (*citing South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622, 632 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965)).

Second, because the decision on short supply is part of the foreign affairs process, review is extremely limited. By law, such matters are committed to Executive discretion. *See Jensen* v. *National Marine Fisheries Service*, 512 F.2d 1189, 1191 (9th Cir. 1975). The court cannot review the Secretary's findings; the court can only determine whether the authorizing law has been followed. *United States* v. *George S. Bush & Co.*, 310 U.S. 371,

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[5] DOC's use of notice and comment procedures is not an admission of the APA's applicability, as plaintiffs contend. It appears an expedient way to carry out the terms of the Arrangement. The use of similar procedures in the *Florsheim* case did not mandate broad judicial review.

[6] Plaintiffs argue that short supply determinaitons are not encompassed within the foreign affairs power because Congress has instructed the Secretary of Commerce, rather than the President, or the Secretary of State, to act on short supply requests. The Secretary of Commerce is involved in some foreign affairs matters apart from this area. *See, e.g.*, 22 U.S.C. § 2123(a)(2) (1982). Furthermore, as a cabinet officer the Secretary is subject to the direction of the President.

379-80 (1940); *AAEI*, 751 F.2d at 1248; *Florsheim*, 744 F.2d at 793; *United States Cane Sugar Refiner's Ass'n* v. *Block*, 69 CCPA 172, 177, 683 F.2d 399, 404 (CCPA 1982). Unlike the *Australian Meat* case, there is no dispute here regarding the scope of the Secretary's authority to act. It is undisputed that the Secretary gathered evidence on the issue of short supply and that a decision was made that relates to short supply. Thus, the court finds that the limited review allowed of the President's decision to withdraw duty-free status as to certain articles in the *Florsheim* case provides the best guide as to the scope of review here. The broader type of review sought by plaintiffs necessarily involves an impermissible intrusion into a discretionary decision-making process.

Here, the Secretary made a decision regarding import levels following consultations with a foreign governmental entity. Although the "agency discretion" exception to APA review is quite narrow, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), the court finds that this matter clearly and directly involves a foreign affairs function. As such, it is committed to agency discretion. *Cf. Mast Industries, Inc.* v. *Regan*, 596 F. Supp. at 1580-82. Therefore, it is inappropriate for the court to review the Secretary's determination.

VII. *Due Process*

In addition, plaintiffs claim that because no hearing on short supply was held, they were denied due process. "Those seeking constitutional protection under the due process clause must point to a 'legitimate claim of entitlement' prior to any considerations of the Government's constitutional obligations". *AAEI*, 751 F.2d at 1250 (*quoting Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring), *reh'g denied*, 417 U.S. 977 (1974)). As indicated, the statute, SISA, and the Arrangement give plaintiffs no rights. Furthermore, there is no generally available, protectable interest to

engage in foreign trade. *AAEI*, 751 F.2d at 1250 (*citing Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933), *and United States* v. *Yoshida International, Inc.*, 63 CCPA 15, 32, 526 F.2d 560, 580 (1975)). Accordingly, plaintiffs' due process claims must fail.

For the foregoing reasons, plaintiffs' actions are dismissed.

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Dated: New York, New York

This 21st day of June, 1985

APPENDIX D

UNITED STATES COURT OF
INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

Court No. 85-5-00664

SACILOR, ACIERIES et LAMINOIRS de LORRAINE, *et al.*,
Plaintiffs,

v.

THE UNITED STATES, *et al.*,
Defendants.

Court No. 85-5-00669

VALLOUREC,
Plaintiff,

v.

THE UNITED STATES, *et al.*,
Defendants.

JUDGMENT

These cases having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED: that these actions are dismissed.

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Dated: New York, New York

This 21st day of June, 1985.